**INTER HERITAGE (M) SDN BHD**

**v.**

**ASA SPORTS SDN BHD (NO 1)**

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-557-2001]
6 DECEMBER 2001

***CIVIL PROCEDURE:*** *Injunction - Ex parte injunction - Validity of order - Affidavit in support - Affidavit an "English translation" - Affidavit not filed or stamped but annexed to another affidavit - Whether could not be relied upon by plaintiff - Whether not properly before the court - Ex parte injunctive order - Whether to be set aside ex debito justitiae - Rules of the High Court 1980, O. 41 rr. 9 10(2), O. 92 r. 1*

***CIVIL PROCEDURE:*** *Injunction - Ex parte injunction - Enforceability - Penal endorsement thereof did not cite named person or provide time frame for compliance - Whether fatally flawed - Order restrained defendant from entering premises but compelled them to return goods thereto - Whether order vague and ambiguous - Whether contradictory - Non-compliance of order - Whether amounted to contempt - Service - Whether order served on defendant - Rules of the High Court 1980, O. 42 r. 6(1), O. 45 r. 7*

***CIVIL PROCEDURE:*** *Affidavit - Validity - Affidavit in support of application for ex parte injunction - Affidavit an "English translation" - Affidavit not filed nor stamped but annexed to another affidavit - Whether valid - Whether could be used in court - Rules of the High Court 1980, O. 41, O 91 r. 1*

By a tenancy agreement dated 17 May 2000, the plaintiff, the owner of Sheraton Imperial Hotel, Kuala Lumpur, rented out parts of the hotel premises to the defendant for the purpose of operating a nightclub and related entertainment facilities ('the club'). Thereupon the defendant made the necessary renovations and proceeded to operate the club as per the terms of the tenancy agreement. Misunderstandings arose between the parties, and on 26 June 2001, the defendant ceased operations of the club and took away several fixtures, fittings and equipments ('the items') from the club. On 28 June 2001, the plaintiff applied for and obtained an *ex parte* injunction against the defendant, essentially: (a) restraining the defendant from removing the items from the premises; (b) compelling the defendant to deliver up the items so removed to the premises; and (c) restraining the defendant from entering the premises ('the injunctive order').

The plaintiff's application for the injunctive order was supported, purportedly, by two affidavits affirmed by Ahmad Zenun ('Ahmad') and Tilesh Kumar Rathod ('Tilesh'). The facts showed however that Ahmad's affidavit contained nothing more than a bare expression of support for Tilesh's affidavit, whilst Tilesh's affidavit, captioned as "English translation" was not filed in court and was merely annexed as an exhibit to Ahmad's affidavit.

Be that as it may, the defendant took the view that para. (c) of the injunctive order had barred them from entering the premises, and consequently did not return the items as injuncted by para. (b) thereof. The plaintiff took this as an act of contempt, and so, at the hearing of the defendant's application to set aside the injunctive order, raised a preliminary objection that, unless the defendant had purged his contempt, the court ought not to hear the said application to set aside. The defendant reiterated that there was no contempt or non-compliance, as the ambiguous and contradictory character of the injunctive order had made it impossible for them to comply with the same. They further submitted that the injunctive order was unsustainable, as Tilesh's affidavit, being only annexed to Ahmad's affidavit and not filed in court, was not an affidavit within the meaning of O. 41 Rules of the High Court 1980 ('RHC'), resulting in the same not being properly before the court.

Before the learned judge, the primary questions that arose were: (i) whether the plaintiff could rely on Tilesh's affidavit to support their application for the injunctive order; (ii) whether the defendant was in contempt of the injunctive order; (iii) whether the preliminary objection ought to be dismissed; and (iv) whether the injunctive order ought to be set aside.

**Held:**

**[1]** Paragraph (c) of the plaintiff's injunctive order had restrained the defendant from entering the premises 'as defined below'. There was however no definition of the premises and so it was correct to say that whoever reads the order would certainly be uncertain. Paragraph (c) of the injunctive order was not only vague but could be construed as void. (p 320 a-b)

**[2]** The injunctive order was also defective in that the penal endorsement therein did not cite a named person or a director of the defendant's company and failed to specify a time frame for compliance. (p 320 b-c)

**[3]** Paragraph (b) of the injunctive order contradicted para. (c) thereof. On the one hand the defendant was barred from entering the premises and, on the other, was required to return the goods to the premises. The injunctive order, so worded, would prevent the defendant from entering the premises and returning the items. (p 320 i)

**[4]** The plaintiff, having obtained the injunctive order in such vague and contradictory terms, is not entitled to vary or be flexible with the same. That being so the defendant could never be in contempt of the injunctive order. In any case, the defendant must first be served with the injunctive order before they could be any contempt. The evidence suggested that the defendant had not been served with the injunctive order.
(p 321 a-b)

**[5]** Tilesh's purported affidavit was not properly before the court as it was only exhibited and annexed to Ahmad's affidavit. The affidavit was also not filed nor stamped in accordance with O. 41 r. 9 and r. 10(2) RHC, and therefore, was not an affidavit within the meaning of the said Order. Further, the affidavit, being an "English translation", contravened O. 92 r. 1 RHC. It was also false as it contained an endorsement that it was filed in court when in reality it was not. With these impediments, the affidavit could not be used or relied upon by the plaintiff.
(pp 327 a & 330 b-c)

**[6]** The plaintiff's application in encl. 3 for the injunctive order must only have Ahmad's affidavit to depend on for support. Ahmad's affidavit, however, was nothing more than a bare affidavit and its contents were clearly inadmissible. The plaintiff's application for the injunctive order, consequently, had no legs to stand on and ought to be set aside *ex debito justitiae*. (pp 327 a & 330 e-f)

*[Preliminary objection dismissed. Ex parte injunction set aside.]*

**Case(s) referred to:**

*Anlaby v. Praetorius [1888] 20 QBD 764* ***(refd)***

*Astro Exito Navegacion SA v. Southland Enterprise Co Ltd And Nan Jong Iron And Steel Co Ltd (The "Messiniaki Tolmi") [1981] 2 Lloyd Rep 595* ***(foll)***

*Bates v. Lord Hailsham of St Marylebone [1972] 2 All ER 1019* ***(refd)***

*Castle Fitness Consultancy Ptd Ltd v. Manz [1990] 1 MLJ 141* ***(refd)***

*Chase Perdana Berhad v. Pekeliling Triangle Sdn Bhd & 2 Ors [2001] 4 AMR 3825* ***(refd)***

*Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors [1998] 1 CLJ 625* ***(refd)***

*Doyle v. Olby (Ironmongers) Ltd [1969] 2 All ER 119* ***(refd)***

*Gan Boon Kyee v. Yap Hong Sin & Anor [1997] 3 CLJ 822* ***(refd)***

*Gordon v. Gordon [1946] P 99* ***(refd)***

*Hadkinson v. Hadkinson [1952] P 285* ***(refd)***

*Hitachi Sales (UK) Ltd v. Mitsui OSK Lines Ltd [1986] 2 Lloyd Rep 574* ***(refd)***

*Iberian Trust Ltd v. Founders Trust and Investment Co Ltd [1968] 2 QB 913* ***(refd)***

*In Re Hinchliffe, A Person Of Unsound Mind, Deceased [1894] 1 Ch 117* ***(foll)***

*Leow Teow Beng v. Liew Chun Wah & Ors [2000] 5 CLJ 318* ***(refd)***

*Messrs Hisham, Sobri & Kadir v. Kedah Utara Development Sdn Bhd & Anor [1988] 1 CLJ 627; [1988] 2 CLJ (Rep) 5* ***(refd)***

*Patricia Liew Yam Ngoon v. MME Fashion Sdn Bhd [1996] 5 MLJ 127* ***(refd)***
*Png Siaw Luan v. Wong Tui San & Ors [1990] 3 MLJ 340* ***(refd)***
*The "Vanda" [1960] 26 MLJ 283* ***(refd)***
*The Mito [1987] 2 Lloyd Rep 197* ***(refd)***
*Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210* ***(refd)***
*Wilson & Whitworth Ltd v. Express & Independent Newspapers Ltd [1969] 1 WLR 197* ***(refd)***

**Legislation referred to:**
Rules of the High Court 1980, O. 41 rr. 5(1), (2), 9(2), 10(2), 11(1), (2), O. 42 rr. 6(1), (2), O. 45 r. 7(3), O. 92 r. 1

**Other source(s) referred to:**
Steward Edward Williams and Frank Guthrie-Smith, *Daniell's Chancery Practice*, 8th edn, vol 1, pp 534, 542-543

*For the plaintiff - Hj Suleiman Abdullah (Salwah Abdul Shukor, R Vatsala, & Jasmine Loo); M/s Zain & Co*
*For the defendant - M Pathmanathan (Elizabeth Verghis, Uma Devi & Aina Aza Said); M/s Sri Ram & Co*

*Reported by WA Sharif*

## JUDGMENT

**Abdul Malik Ishak J:**

***Ex Parte* Summons In Chambers In Encl. 3**

At 4.45pm on 28 June 2001 by way of a certificate of urgency as reflected in encl. 2, the court was moved to hear encl. 3 where the plaintiff sought for the following prayers:

a) an order that the defendant, its officers, servants, employees, agents, assignees and nominees or otherwise be restrained and that an injunction be granted to restrain them from removing any trade fixtures, fittings, equipment, machinery, plant or otherwise on or from the said Premises, as defined hereinbelow;

b) further, or in the alternative, if any such trade fixtures, fittings, equipment, machinery, plant or otherwise have been so removed, an order that the Defendant, its officers, servants, employees, agents, assignees and nominees or otherwise, be compelled, and an injunction be granted to compel them, to return and deliver up such trade fixtures, fittings, equipment, machinery, plant or otherwise so removed, to the Plaintiff in compliance to Clause 6A.1(a) of the Tenancy Agreement;

c) further, an order that the Defendant, its officers, servants, employees, agents, assignees and nominees or otherwise be restrained and that an injunction be granted to restrain them from entering on or upon the Premises, as defined hereinbelow;

d) that the *inter partes* hearing of this application be held on a date to be fixed by this Honourable Court being a date not later from the date not later than 21 days from the date of the order to be made herein.

e) costs to be in the cause; and

f) such further or other relief and order as the Honourable Court deems fit.

The grounds in support of the application for an *ex parte* injunction were manifold and they were set out in encl. 3 itself and, for convenience, I must reproduce them in *verbatim*:

1. The Plaintiff is the registered and beneficial owner of a piece of land held under title no. H.S.(D) 85041, PT 381, Seksyen 41, Jalan Sultan Ismail, Kuala Lumpur (hereinafter referred to as the `Land') on which an international five-star luxury class hotel known as the Sheraton Imperial Kuala Lumpur (hereinafter referred to as the `Hotel') is located.

2. The Plaintiff is also the owner of the Hotel, which is managed by Sheraton Overseas Management Corporation.

3. By an agreement dated 17.5.2000 made between the Plaintiff and the Defendant (hereinafter referred to as the 'Tenancy Agreement'), the Plaintiff agreed to let a part of the Land forming part of the Hotel measuring approximately 14,900 square feet (hereinafter referred to as the 'Premises') to the Defendant for the operation of a nightclub and entertainment facility compatible with a Malaysian five-star luxury class hotel comprising of a grand cafe, disco and music room (hereinafter referred to as the 'Permitted Use') to be known as Riva's, on the terms and conditions therein contained.

4. It was the parties' intention and understanding at all times that the Tenancy Agreement was to be a mutually beneficial venture, whereby the Defendant would assist the Plaintiff in completing the construction of the Club which had been conceptualised and designed by the Plaintiff, and to thereafter operate the Club using the fit-out supplies which had been previously custom-made and ordered and purchased by the Plaintiff for the sole purposes of the Club.

5. It was the parties' intention and understanding at all times that in the event of a termination of the tenancy granted under the Tenancy Agreement, the Club would be yielded up 'lock stock and barrel' to the Plaintiff so that the Plaintiff would be in a position to smoothly and immediately take over the business and operation of the Club immediately subsequent to the Defendant's termination which the Plaintiff views as forming an integral part of the services provided by the Hotel as a five-star luxury hotel to its clientele, without disruption. 'Riva's' is a house brand trade mark owned by the Sheraton group and it is additionally crucial that the goodwill and reputation of the trade mark name 'Riva's' is preserved at all times. The terms of the Tenancy Agreement reflect such an intention.

6. The Fit-Out Supplies were specifically purchased or custom made to order by the Plaintiff when the Hotel first began its operations in 1997, as the Plaintiff originally intended to operate the Premises as a club on its own. Hence, the Fit-Out Supplies were specially selected to conform to the entire concept and design of the Club and of the Hotel in general, and thus form an integral part of the Hotel, and they were provided to the Defendant for the sole purpose and use during the operations of the Club and the tenure of the Tenancy Agreement.

7. It was a material term of the Tenancy Agreement that in the event of the expiration or sooner determination of the tenancy granted under the Tenancy Agreement, the Defendant must surrender peaceably and deliver up possession of the Premises to the Plaintiff clean and free from rubbish in good, clean, substantial and tenantable repair, order and condition in accordance with the Defendant's covenants under the Tenancy Agreement and as nearly as possible in the same condition as at the Commencement Date or in the event any part thereof having been replaced or renewed during the Term as nearly as possible in the same condition as at the date of that replacement or renewal together with all of the Defendant's trade fixtures, fittings, plant, machinery and equipment (fair wear and tear excepted) 'lock stock and barrel' but excluding all the Defendant's stock-in-trade and perishables.

8. On or about 23.6.2001, the Defendant wrongfully posted at the front of the Premises a notice of closure of business of the Club on the misconceived basis that the Premises did not have a valid certificate of fitness for occupation without the consent or authority of the Plaintiff.

9. On or about 26.6.2001, the Hotel received a letter from Riva's Kuala Lumpur Sdn Bhd as agent for the Defendant, stating that they were intending to remove several items from the Premises.

10. In response to Riva's Kuala Lumpur Sdn Bhd's letter of 26.6.2001, the Plaintiff through its solicitors M/s. Zain & Co., requested the Defendant to cease and desist from removal of the Items Within The Premises, as I am advised and verily believe that since following a termination of the tenancy granted under the Tenancy Agreement, the same shall become the property of the Plaintiff.

11. Notwithstanding the Plaintiff's aforesaid request that the Defendant cease removal of any part of the Items Within The Premises, the Defendant did on 26.6.2001 give the Plaintiff further lists of items which they intend to remove from the Premises.

12. On or about the evening of 26.6.2001, 5 to 6 people claiming to be representatives of the Defendant came to the Hotel with a medium-sized truck, and began loading several Items Within The Premises into such truck. When the staff of the Hotel informed them that they ought not to

be removing such items as such items belonging to the Plaintiff, these representatives of the Defendant alleged that such items belonged to them, and threatened and verbally abused the staff of the Hotel stating that in the event they were prevented from removing such items, the Defendant would lodge a police report against them and that the Defendant would hold them personally responsible for any loss arising from such prevention. In order to prevent a breach of the peace on the premises of the Hotel and with the paramount consideration of protecting the security of the clientele and patrons of the Hotel in view of the proximity of the Premises to the Hotel premises and for the security of the staff of the Hotel themselves, the staff of the Hotel did not attempt to forcibly restrain and prevent the removal of the Items Within The Premises. Dato' Yap Kim San, a representative of the Defendant, was then informed by the Plaintiff that this removal and any further removal of items from the Premises were under protest from the Plaintiff.

13. Despite the Plaintiff's protest, from about 10.00 am on 27.6.2001, more representatives of the Defendant with approximately 4 medium-sized trucks removed from the Premises and loaded several Items Within The Premises onto such trucks.

14. Based on the foregoing matters, certain Items Within The Premises have indeed been removed from the Premises, and the Plaintiff reasonably believes that the Defendant intends to dispose of the remaining Items Within The Premises to the detriment of the Plaintiff. Hence the urgent assistance of this Honourable Court is necessary to prevent further loss and damage as well as a possible breach of the peace.

15. The Plaintiff has reasonable belief that the Defendant is intending to hold an auction of the Items Within The Premises on 28.6.2001 without the Plaintiff's consent. Such an action would cause irreparable harm to the Plaintiff, as the Plaintiff may not be able to trace the purchasers of such items and to recover the same and further would tarnish and damage the good name and reputation of the Plaintiff in the eyes of the public, its patrons, servants, agents and other parties with which the Plaintiff has entered into contractual arrangements.

16. The Plaintiff has however no certain information as to the time during which such auction or disposal would be conducted, and that the relief sought by the Plaintiff in the Plaintiff's Application is necessary to ensure that as much of the Items Within The Premises are preserved to protect the Plaintiff's interests.

17. It is pertinent and necessary that the Items Within The Premises are preserved and not removed from the Pemises, having consideration to the unique nature of the Items Within The Premises which have been custom-made to the Plaintiff's requirements and specially selected by the Plaintiff for use at the Club.

18. The Plaintiff reasonably believes that the contents of the Premises are in the process of being removed and disposed and that any further removal or disposal would jeopardise the chance of preserving the contents of the Premises.

19. The Plaintiff asserts that the thrust of the Tenancy Agreement is to preserve the operations of the Club on an 'as is' basis as any termination of the Tenancy granted thereunder for the purpose of facilitating an immediate transfer of the management and operations of the Club to minimise the level of disruption and (the) period of transition.

20. The lack of timely relief for the purposes of preservation of the contents of the Premises would be extremely detrimental to the Plaintiff, having regard to the nature of the fit-out supplies in the Club and the integrality of the Club to the Hotel.

21. The Hotel is part of the Sheraton Luxury collection of international repute, and is a well-known hotel in Kuala Lumpur for its especially high service standards.

22. A full service entertainment facility such as the Club is a necessary integral part of the Hotel and is indeed expected by any patron or the clientele of the Hotel, and any failure by the Hotel to provide entertainment services to its patron or clientele could be construed a misrepresentation to the guests and patrons of the Hotel and injurious to the reputation and goodwill of the Hotel in view of the many collateral promotional efforts taken by the Hotel in conjunction with the Defendant.

23. The manner in which the Defendant had ceased its operations and dealt with the Club after their purported termination of the Tenancy Agreement has been disruptive to general Hotel operations, and such disruption would result in irreparable damage to the Hotel over time and ultimately resulting in loss of customers to the Hotel.

24. It is therefore necessary that the position of the parties must remain *status quo* pending trial until the respective rights of the parties have been conclusively determined.

25. Having due regard to the reputation of the Plaintiff and the Hotel, any damages awarded to the Plaintiff may be inadequate, as any continued disruption to the Hotel and prolonged cessation of the operations of the Club would result in immeasurable loss of custom and damage to the reputation of the Hotel.

26. Further grounds are stated and contained in the affidavits of Ahmad Zenun bin Majid and Tilesh Kumar Rathod affirmed on this 28th day of June 2001 and filed herein.

The averment in para. 26 as alluded to above gave the impression that encl. 3 would be supported by the affidavits of two personalities that were affirmed on 28 June 2001 and filed therein and these two personalities were:

(a) Ahmad Zenun bin Majid (hereinafter referred to as "Ahmad"); and

(b) Tilesh Kumar Rathod (hereinafter referred to as "Tilesh").

Ahmad did affirm an affidavit on 28 June 2001 and the same affidavit was filed on the same date as seen in encl. 4. Ahmad's affidavit was very short – comprising of four paragraphs and again I will be forgiven if I were to reproduce them. The four paragraphs affidavit of Ahmad in encl. 4 were drafted in the Malay language and they were worded as such:

1. Saya adalah seorang Pengarah Sumber Manusia bagi pihak plaintif dan telah diberi kuasa penuh untuk mengikrarkan affidavit ini bagi pihak Plaintif.

2. Semua fakta-fakta yang dideposkan di sini adalah dalam pengetahuan saya sendiri atau dari rekod-rekod pihak Plaintif kecuali di mana dinyatakan sebaliknya dan adalah benar.

3. Saya dengan segala hormatnya memohon kebenaran Mahkamah Yang Mulia ini untuk merujuk kepada Afidavit yang diikrarkan oleh Tilesh Kumar Rathod (No Pasport Fiji 400220) pada 28.6.2001 untuk menyokong Permohonan ini. Sesalinan Afidavit tersebut dilampirkan di sini dan ditanda sebagai Ekshibit 'AZAM-1'.

4. Setelah membaca isi kandungan Afidavit tersebut, saya sesungguhnya percaya dan mengesahkan bahawa semua fakta-fakta yang dideposkan di dalam Afidavit tersebut adalah benar dan saya menerima pakai dan menggunakan Afidavit tersebut demi menyokong permohonan Plaintif untuk perintah injunksi sementara sepertimana dipohon di dalam Saman Dalam Kamar yang difailkan di sini.

It would be apparent that Ahmad was relying entirely on the purported affidavit of Tilesh that was affirmed on 28 June 2001 to support the application of the plaintiff in encl. 3. Tilesh's purported affidavit was captioned "English translation" and it was not filed in court but rather it was annexed as an exhibit marked as "AZAM1" to encl. 4. In short, the averment in para. 26 of encl. 3 as reproduced earlier contained a half truth in that only the affidavit of Ahmad was filed in support of the plaintiff's application for an *ex parte* injunction as seen in encl. 3. Ahmad's affidavit contained precious little. Ahmad relied entirely on Tilesh's purported affidavit that was annexed as an exhibit. Order 41 r. 9 of the Rules of the High Court 1980 ("RHC") states as follows:

> (1) Except as otherwise provided by these rules, every affidavit must be filed in the Registry.
>
> (2) Every affidavit must be endorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.

and Tilesh's so called affidavit can never fall within the scope and ambit of that order. To confound the matter further, Tilesh's purported affidavit was drafted in the English language and it was captioned as an "English translation". By virtue of O. 92 r. 1 of the RHC, the purported affidavit of Tilesh "shall be in the national language" and it "may be accompanied by a translation thereof in the English language." Two questions, germane to the occasion, may be posed here:

(i) Where was Tilesh's affidavit affirmed in the national language and filed in support of the *ex parte* injunctive application in encl. 3? Nothing was said by the plaintiff when encl. 3 was heard on 28 June 2001 in regard to this question. By right the affidavit of Tilesh affirmed in the national language and filed in support of the application for an *ex parte* injunction in encl. 3 should be read together with the affidavit of Ahmad because it was so stated in the averment in para. 26 of encl. 3 as alluded to above.

(ii) Was the plaintiff entitled to rely on the purported affidavit of Tilesh which was exhibited and marked as exh. "AZAM1" to the affidavit of Ahmad and read it as such in its attempt to support the *ex parte* injunctive application in encl. 3? I would venture a negative answer to this question. It is interesting to note that the purported affidavit of Tilesh that was exhibited to the affidavit of Ahmad was quite voluminous. Tilesh's purported affidavit exhibited several documents which were annexed to it (see O. 41 r. 11(1) of the RHC) as exhibits and these exhibits were identified by the certificates of the persons before whom the purported affidavit of Tilesh was sworn (see O. 41 r. 11(2) of the RHC). It would be opening the floodgate if the purported affidavit of Tilesh could be read by the plaintiff in its endeavour to obtain an *ex parte* injunction as reflected in encl. 3. It must be borne in mind that the purported affidavit of Tilesh was an "English Translation" and as such it contravened O. 92 r. 1 of the RHC. Not only that, the purported affidavit of Tilesh was not stamped with the appropriate fee and it can never be construed as an "original affidavit". Order 41 r. 10(2) of the RHC states that:

> An original affidavit may not be used in any proceedings unless it has previously been stamped with the appropriate fee.

and, consequently, it was part and parcel of my judgment that the purported affidavit of Tilesh was not an "original affidavit" and the plaintiff was not entitled to rely and read Tilesh's purported affidavit to bolster its application in encl. 3. In making this ruling, I was not concerned as to whether or not certain exhibits to an affidavit which was properly filed and "stamped with the appropriate fee" formed part of that affidavit because the answer would be in the affirmative. If authority is needed for this proposition, the case of *In Re Hinchliffe, A Person Of Unsound Mind, Deceased* [1894] 1 Ch 117 immediately comes to mind. There AL Smith, LJ succinctly said at p. 120 of the report:

> When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expenses.

I was concerned with the chilling question of whether the plaintiff should, at an *ex parte* stage in an application to obtain an *ex parte* injunction, be allowed to rely on the purported affidavit of Tilesh which was exhibited and annexed to the affidavit of Ahmad? It was certainly the mistake of the solicitor on record to adopt the perilous course of action but I was quite magnanimous when I heard encl. 3 on 28 June 2001. I was, at that point of time, concerned with what Lord Denning had said in *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 All ER 119, particularly at p. 121:

> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. Sometimes the error has seriously affected the course of the evidence, in which case we can at best order a new trial.

After all, encl. 3 was at an *ex parte* stage and eventually it will be heard on an *inter parte* basis. So on that day, when the learned counsel in the person of Haji Suleiman Abdullah submitted in regard to encl. 3 he relied heavily on the purported affidavit of Tilesh as well as the several documents that were exhibited to it. Haji Suleiman Abdullah briefly submitted that the plaintiff is the registered and beneficial owner of a piece of land held under the title no: HS(D) 85041, PT 381, section 41, Jalan Sultan Ismail, Kuala Lumpur (hereinafter referred to as the "land"). On that land an international five-star luxury class hotel known as the Sheraton Imperial Kuala Lumpur stood (hereinafter referred to as the "hotel"). The plaintiff is also described as the owner of that hotel and that hotel is managed by Sheraton Overseas Management Corporation. The defendant operated an entertainment outlet at the hotel, by way of an agreement dated 17 May 2000, and that entertainment outlet was styled as the Riva's. It was a popular night spot in Kuala Lumpur and it even won the coveted award from the Ministry of Culture and Tourism

as the best entertainment spot in Malaysia. Since the plaintiff was unable to produce the certificate of fitness for the hotel, the defendant decided to cease operations and the defendant proceeded to close the business of running the Riva's nightclub with effect from Saturday 23 June 2001. In regard to the certificate of fitness for the hotel, I have nothing to say. I kept an open mind. What will be said, in this judgment, about the certificate of fitness will be a mere repetition of the submissions of the parties. I have, for the moment, nothing further to add. Bearing that in mind, I will now proceed further. Haji Suleiman Abdullah submitted that the defendant took all the fixtures, implements, and fittings belonging to the plaintiff which were found in the Riva's nightclub and he even submitted that the defendant was proposing to hold an auction on the evening of 28 June 2001. It was the stand of Haji Suleiman Abdullah that under the agreement the plaintiff's personal effects and fixtures were to remain at the premises of the Riva's nightclub after the termination or conclusion of the agreement. But, unfortunately, the list of the defendant's stock in trade and perishables were not set out in the agreement. Be that as it may, Haji Suleiman Abdullah informed the court that the other side had asked him to notify them of any application which the plaintiff may make but because of the urgency of the matter and the threatened action, he could not do so. Megarry J once said in *Bates v. Lord Hailsham of St Marylebone* [1972] 2 All ER 1019 that:

> *Ex parte* injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion.

It is salutary to remember that an interim injunction obtained *ex parte* in the absence of any urgency can readily be set aside on that ground alone (*Png Siaw Luan v. Wong Tui San & Ors* [1990] 3 MLJ 340). It would appear that secrecy was essential to the plaintiff when encl. 3 was filed (*Castle Fitness Consultancy Ptd Ltd v. Manz* [1990] 1 MLJ 141 at p. 143F) and that must be the reason why Haji Suleiman Abdullah did not alert the defendant when he filed encl. 3. At the end of the day, I granted prayers (a), (b), (c), (d) and (e) of encl. 3 in favour of the plaintiff. I too ordered the plaintiff to give an undertaking as to damages. Hopefully, the plaintiff was "worth powder and shot" (*The Mito* [1987] 2 Lloyd's Rep 197 at p. 198). I then set the *inter partes* hearing on 16 July 2001. I knew that any good lawyer in town could easily apply to set aside the *ex parte* injunction granted by me bearing in mind that Haji Suleiman Abdullah relied heavily on the purported affidavit of Tilesh and the several documents that were exhibited and annexed to it. But, all the same, I kept an open mind ever willing to hear good submissions advanced by learned counsel and ever willing to keep abreast of the current law. I anxiously awaited that fateful day.

**Summons In Chambers Application Of The Defendant In Encl. 9 And The Preliminary Objection Thereto**

On 13 July 2001 spilling over to 14 July 2001, I heard encl. 9. That was an application by the defendant for the following prayers:

(a) That the *Ex Parte* Order of this Honourable Court dated 28.6.2001 ('the *Ex Parte* Injunction') be and is hereby set aside:

(b) That there be an inquiry and an assessment as to the damages suffered by the Defendant as a result of the *Ex Parte* Injunction and that the Plaintiff do pay the Defendant such amount as shall be found to be due to the Defendant in respect thereof as assessed by this Honourable Court;

(c) That the costs of and incidental to this application be paid by the Plaintiff to the Defendant; and

(d) Such further or other relief as this Honourable Court deems fit to grant.

and it was supported by an affidavit of Wales Tan that was affirmed on 9 July 2001 and filed on 10 July 2001 as seen in encl. 7. Enclosure 9 too was supported by an affidavit of Ngoh Sai Wei that was affirmed on 9 July 2001 and filed on 10 July 2001 as reflected in encl. 8.

In response, the plaintiff responded and through Wilson a/l Robert Fernandez affirmed an affidavit rebutting encls. 7 and 8 and Wilson's affidavit was affirmed on 12 July 2001 which was filed on the same date as seen in encl. 16. The plaintiff also affirmed another affidavit by way of a rebuttal through Dr Kenneth Yeang King Mun and that affidavit was affirmed on 10 July 2001 and filed on 12 July 2001 as reflected in encl. 17. Mior Roslan bin Dato' Mior Jaafar also affirmed an affidavit for the plaintiff on 12 June 2001 which was filed on 12 July 2001 and this affidavit was in response to encls. 7 and 8. Mior Roslan's affidavit can be seen in encl. 18.

The defendant did not remain silent. Through Wales Tan an affidavit was affirmed on 12 July 2001 which was filed on the same date as seen in encl. 19. Again through Wales Tan, the defendant responded and his affidavit can be seen in encl. 23 which was affirmed on 13 July 2001 and filed on the same date. Bluntly put, encls. 19 and 23 served to reply to encls. 16, 17 and 18.

The plaintiff quickly responded and through John Bakurski an affidavit was affirmed on 13 July 2001 which was also filed on the same date and this can be seen in encl. 24. Tilesh then affirmed an affidavit in the national language on 13 July 2001 which was filed on the same date and this can readily be seen in encl. 25. Tilesh again affirmed another affidavit in the national

language for the plaintiff on 13 July 2001 which was filed on the same date and this can clearly be seen in encl. 22. In short, encls. 24, 25 and 22 replied to encls. 19 and 23.

Even before Mr M Pathmanathan, the learned counsel for the defendant, could submit in regard to encl. 9, a preliminary objection was advanced by Haji Suleiman Abdullah in regard to encl. 9 itself. It seemed that due notice had been extended to Mr M Pathmanathan in regard to the preliminary objection. That preliminary objection was in this fashion. That the defendant had not complied with that part of the *ex parte* injunctive order dated 28 June 2001 that required the defendant to return the items taken from the premises of the Riva's nightclub and the defendant still continued and failed to return those items. According to Haji Suleiman Abdullah, the defendant had acknowledged the items that have been taken and had not been returned. In those circumstances, according to Haji Suleiman Abdullah, the defendant who was seeking relief of this court by way of encl. 9 must in the first place not be in contempt of the court by its failure to fulfil the order of this court dated 28 June 2001. It was the submission of Haji Suleiman Abdullah that the defendant had taken the stand that the *ex parte* injunctive order of this court dated 28 June 2001 prohibited the defendant from entering the premises of the Riva's nightclub and that being the case the defendant could not comply with that part of the order that related to those items that were taken from the premises. According to Haji Suleiman Abdullah, the stand of the plaintiff was simple. It was this: bring the items to us and return it back. He submitted that the injunctive order of this court dated 28 June 2001 was plain and straightforward. He then referred to the case of *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210, a decision of Tun Hamid Omar, the then Lord President of the Supreme Court. At p. 212 of the report, his Lordship Tun Hamid Omar in style said:

> Central in these appeals lies the important principle governing the rights, if any, of defendants who disobey orders of Court and then come forward to set aside the order disobeyed or to seek other relief from the Court.
>
> *Obedience to Court Order*
>
> It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.
>
> It has not been seriously disputed and indeed we find that it is also an established general rule of law that a party in contempt cannot be heard further

> in the same proceedings for his own benefit unless and until he has purged his contempt. The question which we have to determine in these appeals is the ambit of that general rule.

In encl. 23, Wilson Tan at paras. 8.1 and 8.3 admitted taking the items from the premises of Riva's nightclub but deposed that the defendant could not return those items because the defendant could not enter the premises in view of the *ex parte* injunctive order of this court dated 28 June 2001. Haji Suleiman Abdullah submitted as follows:

> No great disputes of facts or law here. Both parties agree that there were articles in the premises and that articles were taken from the premises. Both agree that as per YA's order that the articles taken to be returned. Both parties agree that the articles have in fact not been returned.

The items or the articles in question have been listed and tendered as exhs. "NSW1" and "NSW2" which were annexed to encl. 8 – the affidavit of Ngoh Sai Wei. In the context of the agreement dated 17 May 2000, two questions may be posed. Firstly, whether the defendant can take the items or articles out of the premises of the Riva's nightclub? Secondly, whether as per the agreement when the defendant terminates the agreement, the defendant must leave all these items in the premises of the Riva's nightclub?

The learned counsel in the person of Mr M Pathmanathan responded for the defendant. He drew my attention to the affidavit of Wales Tan in encl. 7 where the deponent deposed that the fit out supplies have been and remained at the premises and have not, at any time, been removed by the defendant. The deponent further deposed that the items that were removed by the defendant were not part of the fit out supplies. Mr M Pathmanathan also referred to paras. 9 and 10 of Wales Tan's affidavit in encl. 7 where the deponent categorically stated the items belonging to the plaintiff which the defendant did not take. It was impressed upon me that the agreement was for seven years with an extension of three years to enable the defendant to recoup and make the necessary profits. He rightly pointed out that the determination of the agreement did not come under cl. 6A.1 of the agreement because the words "sooner determination of this tenancy" that appear in the said clause must necessarily refer to determination on account of the defendant's breach or mutual termination. In the context of the present case, Mr M Pathmanathan submitted that the defendant's termination was on account of the plaintiff's fundamental breach which rendered occupation of the premises where the Riva's nightclub was located unlawful by virtue of the failure of the plaintiff to secure the requisite certificate of fitness for the whole building. Since the termination of the agreement was occasioned by the plaintiff's own default which rendered occupation unlawful under the laws of the country, Mr M Pathmanathan ingeniously argued that the plaintiff was not entitled to take

advantage of its own unlawful act and take possession of the defendant's items or articles. It was pointed out that there were occasions when the whole building was without a valid temporary certificate of fitness for occupation (hereinafter referred to as "TCF"). The averments by Wales Tan in his affidavit in encl. 7 certainly make for an interesting reading material. At p. 32, paras. (c) and (d) of encl. 7, Wales Tan deposed as follows:

> (c) all the statements set out in (a) and (b) above is evidenced by the fact that all previous TCFs issued for the Premises were issued after payment of the processing fee. In some instances, the TCF was issued several months after an application was made and the requisite fees paid. In fact, for TCF No. 7857 the requisite fee was paid on 12.5.1999 and the TCF was issued on 24.9.1999; for TCF No. 8215 the requisite fee was paid on 22.5.2000 and the TCF was issued on 21.12.2000;
>
> (d) where there was a delay in the issue of the TCF, the date of the TCF was never retrospective. In fact, there were instances where the premises including the hotel was operating without a valid TCF for up to 9 months (from 24.3.2000 until 21.12.2000). The Defendant was at the material time unaware of this long lapse. Had it been aware, the Defendant would have then ceased operations and terminated the Agreement.

It was part and parcel of Mr M Pathmanathan's submission that between 24 March 2000 till 21 December 2000 there was no TCF and the plaintiff was operating the five-star luxury hotel unlawfully. The patrons of the hotel would also be at a risk of being in occupation of an unlawful premises. It has been said that you cannot occupy the premises without a valid TCF and if you do, you would render the insurance coverage invalid. It was because of this fundamental breach that the defendant terminated the agreement and for this very reason cl. 6A.1 of the agreement was not applicable – it simply did not bite, so submitted Mr M Pathmanathan.

I pause here for a moment. I think it would be ideal to recite the background facts to the whole case. By an agreement dated 17 May 2000, the plaintiff appointed the defendant to complete the construction of approximately 14,900 square feet situated on the ground, second and third floors of the hotel at the defendant's sole cost and expense, in accordance with the building plans, drawings and specifications prepared by the defendant and approved by the plaintiff. That 14,900 square feet of construction was to house a nightclub and an entertainment facility befitting the standards of a five-star hotel to be known as the Riva's. In consideration of the defendant completing the construction of the nightclub premises, the plaintiff agreed to let the premises to the defendant upon, *inter alia*, the following terms and conditions:

(a) that the tenancy of the premises would commence upon completion of the premises for a period of three years at a rental of RM75,000 per month.

(b) that upon expiry of the term of the tenancy, the defendant had the option to renew the tenancy of the premises for a period of two years (first option term), to be followed by a further two years (second option term) and thereafter for three more years (third option term). But the plaintiff was not obliged to grant the third option term.

(c) that the defendant shall at its own cost and expense maintain valid licences, permits, authorisations and approvals required under any law or regulation for the premises and the permitted activities carried on by the defendant in the Riva's nightclub.

(d) that the defendant shall maintain a public liability policy of insurance to provide an indemnity for injury to persons and damage to property.

In so far as termination of the agreement was concerned, the agreement sets out the instances of termination by the defendant and they may be stated as follows:

(i) the defendant may terminate the tenancy before expiry of the relevant term if the defendant was of the reasonable opinion that the operations of Riva's nightclub on the premises do not make it commercially feasible for the defendant to continue operations. This right of termination could be exercised after the first twelve months of the tenancy upon production of satisfactory written evidence and accounting records and, upon three months notice in writing or rental *in lieu* and neither party shall be entitled to make any demands or claims against the other.

(ii) the defendant may also terminate the tenancy by notice in writing in the event of liquidation, dissolution, receivership of the plaintiff or the plaintiff ceasing to carry on business within the hotel building, in which event the defendant shall be entitled to claim actual loss and damage, save and except economic loss, loss of opportunity costs and loss of profits.

(iii) cl. 6A.1 of the agreement provided that at the expiration or sooner determination of the tenancy, the defendant shall surrender the premises together with all the defendant's trade fixtures, fittings, plant, machinery, equipment – the "lock stock and barrel" mechanical equipment, airconditioning, fire-fighting equipment, fit out supplies in the condition as provided by the plaintiff or compensation for the replacement thereof but excluding the stock-in trade and perishables ("the lock stock and barrel clause").

It would be germane to narrate the following set of facts:

(1) In early October 1999, the plaintiff handed over the premises to the defendant on an "as is where is" basis. The defendant swiftly acted and

proceeded to complete the works with diligence. The works were eventually completed at the sole cost and expense of the defendant prior to the expiration of the period of renovation as stipulated under the agreement.

(2) The plaintiff supplied the defendant with cutlery and kitchen utensils, some furniture, carpeting and lavatory fittings, two television sets and audio visual equipment ("fit out supplies") and the costs of all these were borne by the plaintiff.

(3) The defendant proceeded further. Apart from completing the construction of the premises, the defendant equipped the premises with, *inter alia*, further state of the art music instruments, lighting, office, telecommunications, billing, pictures, and statues, furniture, fixtures and fittings.

(4) In terms of finance, the defendant had invested a great deal in the premises in order to make Riva's nightclub the best nightclub in Kuala Lumpur befitting an entertainment facility in a 5-star hotel. The defendant incurred a sum of RM5,207,769.14 to spruce up Riva's nightclub and the breakdown was like this:

(a) RM2.5 million total renovation costs under the agreement;

(b) RM2.7 million being costs of improvements.

(5) As part of its obligations under the agreement, the defendant undertook and agreed to pay a substantial part of the plaintiff's outstanding debts to its creditors. This came up to a colossal sum of RM1,000,000 and the defendant had forked out this sum to the plaintiff's creditors.

Now, it was submitted that the failure on the part of the plaintiff to procure a valid TCF for the premises wherein Riva's nightclub was located constituted a fundamental breach of the agreement and it also constituted a repudiation of the agreement by the plaintiff. The defendant terminated the agreement with immediate effect and undertook to release the keys to the premises by 23 June 2001 after the defendant had removed their belongings from the premises in an attempt to mitigate losses. Pursuant to cl. 13.5 of the agreement, it was submitted that the termination letter was delivered to the company secretary of the plaintiff at Signet & Co at 5.15pm on 22 June 2001. To play safe, a copy of the same letter was delivered to the plaintiff's office at the hotel complex at 5.06pm on 22 June 2001. Acting prudently and in accordance with the termination letter, the defendant ceased its operations and closed its business on 22 June 2001 since the plaintiff had still not, as of that date, delivered the TCF. In pursuance to the cessation of the operations and closure of Riva's nightclub, the defendant posted a notice at the entrance of Riva's

nightclub and that notice was worded like this:

> Please be informed that the Riva's Kuala Lumpur will be closed effective 22nd June 2001. We regret to inform that this premise has no valid C.F. Sorry for the inconvenience caused.
>
> The Management.

The notice put up by the defendant (hereinafter referred to as the "Riva's notice") was removed by the servants or agents of the hotel. The manager of the hotel by the name of Alain L Rigodin informed the manager of Riva's nightclub by the name of Prakash s/o Gopalan that the Riva's notice had been removed and would be replaced by the hotel's notice. On 22 June 2001 at 11pm, the hotel replaced Riva's notice with that of its own – hereinafter referred to as the "Sheraton notice." Interestingly, the Sheraton notice was worded like this:

> Please be informed that the premises will be temporarily closed effective from 22.6.2001. Sorry for the inconvenience caused.
>
> The Management.

What was the *ex parte* injunctive order that was granted by me on 28 June 2001? The answer can be readily appreciated by reproducing that very order as reflected in encl. 5 and it was worded in the national language:

> PERINTAH INJUNKSI (*EX PARTE*)
>
> ATAS PERMOHONAN Plaintif tersebut di atas melalui Saman Dalam Kamar yang bertarikh 28 haribulan Jun 2001 DAN SETELAH MEMBACA Saman Dalam Kamar bertarikh 28 Jun, 2001 dan Afidavit yang diikrarkan oleh Ahmad Zehnun bin Abdul Majid pada 28 Jun 2001 yang difailkan bersama ini DAN SETELAH MENDENGAR Tuan Haji Sulaiman Bin Abdullah, Cik Salwah Abdul Shukor, Cik R. Vatsala dan Cik Jasmine Loo, peguam-peguam bagi pihak Plaintif DAN Plaintif olehnya yang tersebut mengaku untuk mematuhi apa-apa perintah yang dibuat oleh Mahkamah atau hakim tentang gantirugi kiranya Mahkamah atau hakim berpendapat selepas itu telah ditanggungi apa-apa yang disebabkan perintah ini yang Plaintif patut bayar MAKA ADALAH PADA HARI INI DIPERINTAHKAN BAHAWA:
>
> a) Defendan olehnya sendiri dan/atau melalui pegawainya, pekerjanya, ejennya pengkhidmatnya atau sebaliknya, adalah dihalang daripada mengalihkan, dan satu injunksi diberikan demi menghalang pengalihan, sebarang kelengkapan atau perkakas dagangan, peralatan, jentera, perkakas atau lain-lain barang daripada Premis tersebut, seperti yang didefinasikan di bawah;
>
> b) Sekiranya sebarang kelengkapan atau perkakas dagangan, peralatan, jentera perkakas atau lain-lain barang telahpun dialihkan, satu perintah bahawa Defendan, pegawainya, pekerjanya, ejennya, pengkhidmatnya atau

sebaliknya dikehendaki, dan satu injunksi diberikan demi memaksa Defendan, pegawainya, pekerjanya, ejennya, pengkhidmatnya atau sebaliknya untuk memulangkan dan menyediapulihkan yang sama berikutan dengan Klausa 6A.1 (a) Perjanjian Penyewaan;

c) Defendan, pegawainya, pekerjanya, ejennya, pengkhidmatnya atau sebaliknya adalah dihalang dan satu injunksi diberikan bagi menghalang mereka daripada memasuki Premis tersebut, seperti yang didefinasikan di bawah;

d) Pendengaran *inter partes* permohonan ini diadakan pada tarikh yang ditentukan oleh Mahkamah Yang Mulia ini, iaitu 16 Julai 2001 iaitu suatu tarikh yang tidak melampaui 21 hari dari tarikh perintah yang diberikan secara dipohon;

e) Kos adalah di dalam kausa; dan

f) Plaintif akujanji memberi gantirugi seperti yang tersebut di atas.

Bertarikh 28 haribulan Jun, 2001.

The *ex parte* injunctive order prevented the defendant from gaining entry into Riva's nightclub and Mr M Pathmanathan correctly pointed out that the defendant could not return the items and articles that were taken because of the existing injunctive order. But Haji Suleiman Abdullah still insisted that the defendant should put back the items or articles inside the premises and he then submitted that if that were done, the plaintiff was willing to allow the defendant to continue with the business.

Mr M Pathmanathan responded. He rightly submitted that an *ex parte* order can be set aside on an *ex parte* basis because of the urgency of the matter. He rightly pointed out that the *ex parte* injunctive order as reflected in encl. 5 employed in para. (a) the following words "seperti yang didefinasikan di bawah" – meaning "as particularised below"; but unfortunately this was not done. Flowing from this, Mr M Pathmanathan rightly submitted that the injunctive order was so vague and uncertain that the defendant was in a quandary as to how to comply with it. The defendant was perplexed and in a state of a dilemma as to how to obey the *ex parte* injunctive order in encl. 5.

It must be recalled that para. (b) of the *ex parte* injunctive order in encl. 5 contained a mandatory order compelling the defendant to return all the goods removed and it made reference to a particular clause in the agreement, namely, cl. 6A.1(a) thereof. Whoever reads this very order will have to look for the agreement and see the clause in question. It was not a wholesome *ex parte* injunctive order at all. Now, reverting back to para. (c) of the *ex parte* injunctive order in encl. 5, the defendant was restrained from entering the

premises as defined below but, unfortunately, there was no definition of the premises and so it was correct to say that whoever reads the said order would certainly be uncertain. It was correctly submitted by Mr M Pathmanathan that para. (c) of the *ex parte* injunctive order in encl. 5 was not only vague, it can also be construed as void. To add insult to injury, the penal endorsement in the *ex parte* injunctive order in encl. 5 failed to cite a named person or a director of the defendant's company and it also failed to specify a time frame for compliance and, finally, it was unsigned (but to be fair to the plaintiff there is no requirement under the RHC that the penal endorsement has to be signed). It must be pointed out that Form 87, appendix "A" of the RHC requires a time frame to be incorporated in the penal endorsement. In my judgment, the terms of the *ex parte* injunctive order in encl. 5 were unclear and ambiguous. It is essential that the terms of the injunctive order in encl. 5 be clear and unambiguous bearing in mind that non-compliance with the said order could lead to a loss of liberty to the recipient of that order. It would be a correct statement of the law to say and I so say that an injunctive order should be drafted in as definite, clear and precise terms as possible. Precision in the language employed would be the order of the day; it is purely to prevent confusion and misunderstanding. Of utmost importance, it is to enable the recipient of the injunctive order to understand and obey the said order. The court in *Iberian Trust Ltd v. Founders Trust and Investment Co Ltd* [1968] 2 QB 913 ruled that an order to "return" shares in a company held by the defendant to the plaintiff to be unenforceable because it was not an order to do an act. The order was held to be vague and ambiguous. Luxmore J delivering the judgment of the court was of the view that the proper form of the order was for a declaration to be made stating, *inter alia*, that the plaintiff was entitled to the shares and an order directing the defendant to execute a proper transfer of the shares in the company to the plaintiff. Similarly, in the same vein, the court in *Wilson & Whitworth Ltd v. Express & Independent Newspapers Ltd* [1969] 1 WLR 197 held that the terms of the undertaking were not clearly defined and hence it was not enforceable. At this juncture, I am reminded of what Lord Greene said in *Gordon v. Gordon* [1946] P 99 at 102:

> It is of great importance, especially in cases where the parties are likely to be in controversy and make difficulties, and perhaps to be contumacious and hostile, that orders which may have to be enforced by proceedings for committal or attachment should be of a perfectly precise nature, so that there can be no controversy about the duty which has to be performed under them.

I must say at once that para. (b) of the injunctive order in encl. 5 contradicted para. (c) thereof. On the one hand the defendant was barred from entering the premises and, on the other, the defendant was required to return the goods to the premises. It was submitted that the plaintiff's solicitors have offered to

vary the injunctive order and grant indulgence in order to enable the defendant to comply with the said order. It was rightly pointed out that the plaintiff had sought and had obtained the injunctive order in those terms and the plaintiff, just like the defendant, must be bound by it. It was not open to the plaintiff to vary the injunctive order in encl. 5 and neither was the plaintiff entitled to be flexible under the said order.

Mr M Pathmanathan posed a very crucial question. It was a question of critical substance. It was this. Whether the plaintiff has served the *ex parte* injunctive order in encl. 5 on the defendant? He ventured a reply and it was in the negative. He handed to me a letter dated 13 July 2001 which was from the plaintiff's solicitors and addressed to the defendant's solicitors. The third paragraph of that letter was highlighted and it was worded in this way:

> We refer to paragraph 3 of your abovementioned letter and wish to state that your client had probably not been served with our letter of 2 July 2001 as your client had attempted to evade service of the *ex parte* order.

Flowing from this, Mr M Pathmanathan submitted that since the defendant was not served with the *ex parte* injunctive order as per encl. 5, how could the defendant be said to be in contempt of that *ex parte* injunctive order? Haji Suleiman Abdullah relied on the case of *Wee Choo Keong (supra)* to drive home the point that a person who is in contempt cannot be heard until his contempt is purged. It was the stand of Haji Suleiman Abdullah that the defendant was in contempt and, consequently, the defendant's summons in chambers application in encl. 9 cannot be heard. It is germane, at this juncture, to refer to a letter dated 12 July 2001 from M/s Sri Ram & Co – the solicitors of the defendant, and that letter was addressed to the plaintiff's solicitors, namely, M/s Zain & Co. It would certainly be ideal to reproduce this very letter which was exhibited as exh. "WT26" and annexed to the affidavit of Wales Tan in encl. 19, and I shall do so now:

> Date: 12 July 2001
>
> **RE: KUALA LUMPUR HIGH COURT SUIT NO. S5-22-557-2001 INTER HERITAGE (M) SDN BHD V. ASA SPORTS SDN BHD**
>
> 1. Your letter of 11th instant giving us notice of a preliminary objection refers.
>
> 2. We reiterate the contents of our letter of the 10th instant that paragraph (c) of the terms of the *Ex parte* Order that your client sought and obtained, itself expressly prohibits and injuncts our client, their servants, officers, agents or otherwise howsoever from entering the Premises.
>
> 3. Our client is in a quandary as to the manner of compliance with the

mandatory order which your client obtained *ex parte* and contained in paragraph (b) of the same Order, except under pain of contempt.

3.1 Paragraphs (b) and (c) of the *Ex parte* Order dated 28.6.2001 are contradictory on the face of it as compliance with one necessarily attracts breach of the other;

2.2 We further note that the said Order of Court does not specify the time frame within which our client is to comply with paragraph (b).

4. On their part, our client will abide by, obey and respect any Court Order. However, they are unable/prevented from complying with paragraph (b) by reason of paragraph (c) of the *Ex parte* Order dated 28.6.2001.

5. Precisely for this reason, our client had to decline your client's invitation to attend/witness the proposed 'cleaning-up' by your client at 10.00 a.m. on Wednesday, 11.7.2001.

6. Further our client instructs us to assure your client that their fears that our client will dispose/auction off the items they removed are totally unfounded and baseless. In fact, the Court was moved to grant the *Ex parte* Injunction on 28.6.2001 on the false premises that our client was about to conduct an auction of the items that had been removed. All the items that our client has removed is in our client's custody and our client has no intention of disposing of any of them until further order or final disposal of the matter. In this regard, we enclose herewith the lists of all items removed from the Premises on 26.6.2001 and 27.6.2001.

7. In the Premises your preliminary objection is not only misconceived but frivolous and vexatious and an abuse of the court process and an attempt to gag our clients from presenting the full facts before the Court.

This very letter, in no uncertain terms, expressed the dilemma of the defendant. The defendant was certainly in a quandary. The defendant did not know what to do. It was a classic case of choosing between the "devil and the deep blue sea". Both would be utterly abhorrent to the defendant. But one thing was very clear and that was that the defendant merely had knowledge of the *ex parte* injunctive order as reflected in encl. 5. It must be borne in mind that before the defendant is to be held in contempt the order in encl. 5 has to be served on the defendant and the letter dated 13 July 2001 as alluded to earlier showed:

> that your client (referring to the defendant) had probably not been served ... .

with the order. And flowing from this, Mr M Pathmanathan submitted that:

> if the plaintiff does not know whether the order has been served what more can I say.

Mr M Pathmanathan then submitted that:

> It is not open to the plaintiff to even allege contempt when they had moved this court on an *ex parte* basis and thereafter failed to show any urgency by not serving it which in itself showed that the court was moved on the ground of urgency which did not exist.

But the *ex parte* injunctive order as presently worded would prevent the defendant from entering the premises and returning the items that were taken. In view of this *impasse*, must the defendant be prevented from pursuing their summons in chambers application in encl. 9? Tun Hamid Omar LP in W*ee Choo Keong (supra)* provided the answer. At p. 213 of the report, his Lordship in style said:

> We are in favour of the views expressed by Denning L.J. in *Hadkinson (supra)* that it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt. This flexible approach to the jurisdiction is based upon a discretion to be exercised in accordance with the circumstances of the case which was accepted by the House of Lords in *X Ltd. & Anor. v. Morgan - Grampian (Publishers) Ltd & Ors.* [1990] 2 All ER.

In the same breath, Tun Hamid Omar LP sounded a note of caution in these salient words (see the second paragraph of p. 213 of the report, left hand column):

> In this regard, we are mindful of the competing public interest in a litigant having a right to be heard. Although the right to be heard is a fundamental right vested in all litigants, that right however cannot be taken as an absolute right. Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt.

From the tenor of the letter dated 12 July 2001 (exh. "WT26" of encl. 19) that was reproduced earlier it was clear that the defendant showed "regard to an order issued against" them because the defendant was fearful of being cited for contempt by entering the premises in the process of returning the items. Surely by being in this predicament, the defendant was entitled to file encl. 9 and it was now "a matter of discretion" (borrowing the words of Tun Hamid Omar in *Wee Choo Keong*) whether the defendant "ought to be heard". Haji Suleiman Abdullah submitted that the defendant was in contempt by not returning the items but Mr M Pathmanathan submitted that the defendant was desirous of returning the items but was prevented from doing so by virtue of para. (c) of the *ex parte* injunctive order. Since I have held that the terms of the *ex parte* injunctive order in encl. 5 were unclear and ambiguous, I must accordingly exercise my judicial discretion to hear encl. 9 after all the *ex parte* summons in chambers in encl. 3 which gave rise to the *ex parte* injunctive

order merely hinged on the purported affidavit of Tilesh which, in the first place, should not be read to support the *ex parte* application in encl. 3. I had my misgivings in allowing Haji Suleiman Abdullah to rely and read the purported affidavit of Tilesh on 28 June 2001 which ultimately gave rise to the *ex parte* injunctive order in encl. 5. I did say that, on 28 June 2001, the speech of Lord Denning in *Doyle*'s case *(supra)* had convinced me that the course I took in allowing Haji Suleiman Abdullah to rely and read the purported affidavit of Tilesh was the correct one. But now I had second thoughts as to whether that was, in reality, the correct course to pursue. Be that as it may, I had to decide on whether to allow the defendant to proceed with encl. 9 which was basically to set aside the *ex parte* injunctive order granted by me on 28 June 2001 as reflected in encl. 5.

Mr M Pathmanathan sought to differentiate and highlight certain features of *Wee Choo Keong*. He painstakingly submitted that the principle enunciated in *Wee Choo Keong* had a narrow and limited application. He stressed that the Supreme Court in *Wee Choo Keong* made a finding that there was contempt and that the contemnor must purge that contempt first. Whereas in the present case there was only a mere allegation of contempt – no *prima facie* or proven contempt, and the defendant was applying to set aside the *ex parte* injunctive order as seen in encl. 5. This was the brunt of the submission of Mr M Pathmanathan. He then cited the case of *Astro Exito Navegacion SA v. Southland Enterprise Co Ltd And Nan Jong Iron And Steel Co Ltd (The "Messiniaki Tolmi")* [1981] Lloyd's Law Reports, vol. 2, 595 and he relied on the judgment of Lawton LJ at p. 604 of the report where his Lordship said:

> The short point on this application is whether it is right to stay the appeal on the terms suggested by the sellers because the buyers are admittedly in contempt of the order against which they appeal.
>
> In my judgment there can be no absolute rule which entitles or disbars a party in contempt from prosecuting an appeal against the order with which he has failed to comply, though I do not dissent from the general principles enunciated by my Lord, Lord Justice Brandon, in the judgment he has just delivered. In the present case it seems to me that it would be wrong to anticipate the decision of this Court on the hearing of the appeal brought by the buyers and therefore wrong to impose on the buyers the terms which the sellers seek. Accordingly I would dismiss this application.

Writing a separate judgment in the same case, Brandon LJ had this to say at p. 602 of the report:

> Having considered the various authorities to which we were referred, I have come to the conclusion that the contention put forward on behalf of the buyers and the buyers' agents, supported as it is by the judgment of Lord Cottenham,

L.C., in *Chuck v. Cremer,* [1846] 1 Coop. Temp. Cott. 205; 47 E.R. 820, and that of Lord Justice Romer in *Hadkinson v. Hadkinson,* [1952] P. 285, is correct in law. In other words, I accept that, while the general rule is that a Court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt.

I would, however, add two qualifications to what I have just said. The first qualification is that there may be cases where an appeal by a party in contempt against the very order disobedience of which has put him in contempt, can be shown to be, for one reason or another, an abuse of the process of the Court. In such a case the exception to the general rule discussed above would not apply. There is no suggestion, however, that the appeal of the buyers and buyers' agents in the present case is for any reason an abuse of the process of the Court.

The second qualification is that, where what is involved in a case is the welfare of a minor, a Court may be justified in insisting on a party, who has disobeyed an order relating to that minor, obeying it before hearing his or her appeal from it. This qualification arises from the general principle of law, now contained in s. 1 of the Guardianship of Minors Act, 1971, that, in any case concerning a minor, the Court must regard the welfare of the minor as the first and paramount consideration.

And his Lordship Brandon LJ while approving the decision of Lord Justice Romer in *Hadkinson v. Hadkinson* [1952] P 285 as good law, added a caveat to it when he said that:

there is an established exception to that general rule where the purpose of the application is to appeal against, or to have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt.

And using these passages as springboards Mr M Pathmanathan rightly submitted that the defendant was entitled to succeed in their application in encl. 9. In short, he was saying that the defendant was entitled to have encl. 9 heard. I would certainly subscribe to that submission.

Mr M Pathmanathan proceeded further. He pointed out that it was not even possible for the defendant to be in contempt of the court order dated 28 June 2001 as per encl. 5 for the following reasons:

(1) Order 42 r. 6(1) of the RHC states, *inter alia*, that "a judgment or order which requires a person to do an act must specify the time …. within which the act is to be done" and in sharp contrast the court order in encl. 5 did not specify a time frame and it was thus defective.

(2) That the court order in encl. 5 had not been served personally on the director or other officer of the defendant company. Order 45 r. 7(3) of the RHC states as follows:

> Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(ii) or (iii) unless:
>
> (a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of seizure and sale or against whom an order of committal is sought; and
>
> (b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act.

and in the context of the present case, there was no clear proof that the director or the officer of the defendant was evading service of the court order.

(3) The court order in encl. 5 in its present form and in the language as presently worded can never attract contempt.

(4) There was no appropriate penal endorsement in the court order in encl. 5 and what was said by Edgar Joseph Jr J (as he then was) in *Messrs Hisham, Sobri & Kadir v. Kedah Utara Development Sdn Bhd & Anor* [1988] 1 CLJ 627; ([1988] 2 CLJ (Rep) 5) at p. 635 (p. 13) must surely ring true. There his Lordship said:

> Since it was common ground that neither the company nor the alleged contemnors were served with the consent order bearing the appropriate penal endorsement, duly or at all, as required under Order 45 rule 7 (4), the application for committal was fatally flawed on this ground as well (see, for example, *Arumugam v. Suppiah Chettiar* [1935] MLJ 4; *The Vanda* [1960] MLJ 283).

and on the same page of the same judgment his Lordship gave an apt example of the right way to frame a penal endorsement.

I will now refer to some authorities.

Writing a separate judgment in the case of *Hitachi Sales (UK) Ltd v. Mitsui OSK Lines Ltd* [1986] Lloyd's Law Reports, vol. 2, 574 CA, Lord Justice O'Connor referred to the case of *Anlaby v. Praetorius* [1888] 20 QBD 764 where the headnote states that:

> Where a plaintiff has obtained judgment irregularly, the defendant is entitled *ex debito justitiae* to have such judgment set aside: and the Court has only power to impose terms upon him as a condition of giving him his costs.

And it was quite apparent, as alluded to above, that the court order in encl. 5 contained quite a number of impediments and it also contravened several provisions of the RHC. The strict requirements of the RHC must be complied with to the very letter otherwise there will be chaos in courts (*Leow Teow Beng v. Liew Chun Wah & Ors* [2000] 5 CLJ 318).

The headnote in the case of *The "Vanda"* [1960] 26 MLJ 283 merits reproduction. It states:

> Not all parties in contempt are precluded from being heard: it depends upon the circumstances of the case whether or not they are entitled to be heard. In the present case one of the grounds of appeal was that the very order which was disobeyed by the defendant was not properly indorsed as required by O. XXXIX r. 5.
>
> Held: in the circumstances of the particular case, the defendant had a right of appeal and was entitled to be heard.

In *Patricia Liew Yam Ngoon v. MME Fashion Sdn Bhd* [1996] 5 MLJ 127, the headnote at Held (2) bears repetition. It says:

> (2) Order 42 r 6(1) of the RHC states that an order which requires a person to do an act must specify the time after service of the order, or some other time, within which the act is to be done. It is essential that the time within which the act is to be done must be expressly stated in the order as required under O. 45 r. 5 of the RHC. Consequently, the said order was not enforceable under O. 45 r. 5 of the RHC and the indorsement of the said order with the notice was improper and should be deleted. The said order should be redrawn and perfected accordingly (see pp 131E, 132C); *Haw Par Bros (Pte) Ltd v. Dato Ah Kow* [1973] 2 MLJ 169 followed.

In *Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors* [1998] 1 CLJ 625, the headnote at Held (2) of p. 626 of the report carries this report:

> [2] Strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, a speedy and efficient administration of justice. Objections to technicalities must be viewed *prima facie* as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration of justice will be curtailed if the rules embodied in the RHC are not religiously followed. As a code of procedure the RHC should be strictly followed to the letter.

All these authorities are germane and they add mileage to the submissions of Mr M Pathmanathan. Clearly, in the present case, there was blatant non-compliance with the rules yet the plaintiff sought to gag the defendant,

so to speak, in advancing their case forward on the flimsy ground that the defendant was in contempt. It was rightly submitted that the order of the court in encl. 5 should be set aside *ex debito justitiae*. For these reasons, I have no hesitation in dismissing the preliminary objection with costs and I ruled that the defendant's application in encl. 9 should be heard forthwith. But Haji Suleiman Abdullah was still adamant. He continued to submit and I patiently recorded his submissions. It was a long drawn process. Taxing in the extreme. He implored this court to incorporate the time stipulation in the court order of encl. 5 by relying on O. 42 r. 6(2) of the RHC. And Mr M Pathmanathan quickly responded and he said that the court order in encl. 5 did not specify the time and for that reason it should be set aside and further there was no contempt committed by the defendant at all. Haji Suleiman Abdullah responded and he submitted that the court order in encl. 5 was not wrong *per se*. He submitted that he was not saying that contempt proceedings should be taken. He submitted that Mr M Pathmanathan's submissions thus far made would apply if he were interested in advancing contempt proceedings against the defendant. He submitted that the *ex parte* injunctive order in encl. 5 together with the relevant cause papers were served on the defendant's solicitors who had authority to accept such service. He pointed out that the *ex parte* injunctive order in encl. 5 was served against the defendant company on 4 July 2001 at 9.00am and 9.30am respectively by placing that very order at the defendant's registered office at suite 8-8, Faber Imperial Court annex, Sheraton Imperial, Jalan Sultan Ismail, 50250 Kuala Lumpur and at number 99-100, First Floor, Life Centre, Jalan Sultan Ismail, 50250 Kuala Lumpur. The process server had duly served and dated the service thereof on 4 July 2001. That being the case, Haji Suleiman Abdullah confidently submitted that service had been effected on the defendant. He conceded that to cite the director of the defendant's company for contempt, personal service must be effected on the director himself. In the wider context, he submitted that so far as the defendant was concerned, the company had acted through its directors, its solicitors and therefore it was said that the defendant knew that it had to bring the items back. He submitted that the *ex parte* injunctive order in encl. 5 was drafted in a simple fashion and it required no great intelligence or subtlety to understand its provisions thereto. He submitted, matter of factly, that the defendant had to give it back. It was vigorously submitted that the defendant did not deny but admits taking the items from the premises and that the defendant too said that the items taken were in the defendant's custody. However, it was submitted that the defendant said that they could not comply with the order because the defendant was fearful of breaching the other part of the *ex parte* injunctive order. The stand of the plaintiff was rather simple: give us back the items and we will put them back inside. It was submitted on behalf of the plaintiff that reasonable time was needed to comply with the *ex parte* injunctive order since time was not specified.

It was emphasised that the authorities relied upon by Mr M Pathmanathan were all in the nature of contempt cases. *Hitachi Sales (UK) Ltd v. Mitsui OSK Lines Ltd (supra)*, for instance, was a case involving an "unless order" whereas the present case under adjudication was not. It was submitted that the plaintiff was not interested in initiating contempt proceedings against the director of the defendant's company and it was for this reason that the penal endorsement in the *ex parte* injunctive order did not specify a particular individual. It was emphasised that the issues of time frame, absence of service on the director of the defendant's company and no appropriate penal endorsement were only relevant when the plaintiff proposed to initiate contempt proceedings. It was wishfully submitted that the defendant was in a position to obey the *ex parte* injunctive order in its present form. It was reiterated that the defendant had been served with encl. 5 through their solicitors but not their directors. Thus, in order to give efficacy to the order of the court, it was submitted that the justice of the case together with the exercise of the court's discretion require the defendant to return the fittings that were taken away. This the defendant must do before the court proceeds to hear encl. 9, so the submission went. Bluntly put, the plaintiff held the view that encl. 9 can be heard after the items are returned.

Having heard the parties, I summarily dismissed the preliminary objection with costs. I wholeheartedly agreed with the submissions of Mr M Pathmanathan. To recapitulate, it was part and parcel of my judgment that the:

(1) *ex parte* injunctive order was vague and uncertain and the defendant was in a quandary in complying with it;

(2) terms of the *ex parte* injunctive order were unclear and ambiguous;

(3) *ex parte* injunctive order was not served on the defendant; and the

(4) *ex parte* injunctive order was not clearly worded and hence it was not enforceable – it was with respect, an unenforceable order with should be redrawn and perfected expeditiously.

It was part and parcel of my judgment that the defendant was not in contempt of the *ex parte* injunctive order because the defendant wanted to return the items but they could not enter the premises in view of the prohibitory language of that court order. If the views that I have expressed are incorrect and that this court should not hear the application in encl. 9 until the defendant has purged their contempt, the established exception as set out by Brandon LJ in *The "Messiniaki Tolmi" (supra)* as reproduced somewhere in this judgment must surely apply for the benefit of the defendant. The speech of Lawton LJ in *The "Messiniaki Tolmi" (supra)* that "there can be no absolute rule which

entitles or disbars a party in contempt from prosecuting an appeal against the order with which he has failed to comply" – as reproduced earlier, somewhere in this judgment, should be vigorously applied in favour of the defendant. The upshot of it all was this, that this court should proceed to hear the defendant's application in encl. 9 forthwith.

**Hearing Of Encl. 9**

True enough, Mr M Pathmanathan submitted that when this court heard the plaintiff's application in encl. 3 on 28 June 2001, the purported affidavit of Tilesh was not before the court because Tilesh's purported affidavit was exhibited and annexed to Ahmad's affidavit as "AZAM1" of encl. 4. Only the affidavit of Ahmad was available in encl. 4 to support the plaintiff's application in encl. 3. Tilesh's purported affidavit was not filed as alleged but rather it was exhibited and annexed to Ahmad's affidavit. It was correctly pointed out by Mr M Pathmanathan that the purported affidavit of Tilesh was not an affidavit within the meaning of O. 41 of the RHC, and that this court was not informed of that impediment, and that this court was led to believe that the purported affidavit of Tilesh had been so filed, and that this court granted the application in encl. 3 in good faith and in the belief that the purported affidavit of Tilesh and the exhibits annexed thereto were before this court. The weaknesses of Tilesh's purported affidavit which gravely affected the plaintiff's application in encl. 3 have been alluded to by me in the early part of this judgment and I do not propose to repeat them again. Suffice for me to say that in reality the plaintiff's application in encl. 3 had no leg to stand on. It was an exercise in futility on the part of the plaintiff to rely on the purported affidavit of Tilesh in advancing their application in encl. 3. The affidavit of Ahmad was nothing more than a bare affidavit and its contents were inadmissible. Tilesh's purported affidavit was not filed in accordance with O. 41 of the RHC and so it could not be relied upon by the plaintiff. It was apparent that Tilesh's purported affidavit was false because it contained an endorsement that his affidavit was filed in court but in reality it was not done when encl. 3 was heard by me. The false endorsement was worded in this way:

> This supporting affidavit (referring to Tilesh's purported affidavit) was filed by M/s Zain & Co., solicitors for the plaintiff whose address is at 6th & 7th Floor, Bangunan Dato Zainal, 23, Jalan Melaka, 50100 Kuala Lumpur. [Tel 26986255; Fax 26986969]
>
> Ref: 20100377/SA/SAS/VR/JL.

and it was very misleading in the extreme. The falsity of it all was quite apparent. Tilesh's purported affidavit contravened O. 41 r. 9 of the RHC as it was not filed in the registry. Of pertinence would be the absence of an indorsement on Tilesh's purported affidavit and the leave of the court was not

obtained for its use (see O. 41 r. 9(2) of the RHC). There is a saving provision in r. 10 of O. 41 of the RHC where leave of the court could be obtained to use Tilesh's purported affidavit notwithstanding that it had not been filed in accordance with r. 9 of O. 41 of the RHC but unfortunately during the hearing of encl. 3 on 28 June 2001 there was no such request. Even if there was such a request, I would certainly refuse leave because Tilesh's purported affidavit was not filed nor stamped with the appropriate fee – a requirement under O. 41 r. 10(2) of the RHC. *Daniell's Chancery Practice*, 8th edn by Steward Edward Williams and Frank Guthrie-Smith, vol. 1 at p. 542 to p. 543 contains the following illuminating passages that should be reproduced:

> Except by leave of the Court or a Judge, no order made *ex parte* in Court founded on any affidavit is of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion (Order XXXVIII 19; *Jackson v. Cassidy* 10 Sim. 326; *Darley v. Nicholson* 1 Dr. & War. 66, 70; *Elsey v. Adams* 4 Giff 398).

The numerous impediments to the purported affidavit of Tilesh were fatal: that affidavit cannot be read in support of encl. 3 and, consequently, there was no evidence before this court on 28 June 2001 when encl. 3 was heard.

By way of a rebuttal, Haji Suleiman Abdullah argued that Ahmad's affidavit came under the provisions of O. 41 r. 5(2) of the RHC:

> An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof.

and he submitted that it was not caught under O. 41 r. 5(1) of the RHC which states that:

> Subject to Order 14 rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38 rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.

Now, to recall, Ahmad's affidavit in encl. 4 contained precious little. The critical point of substance was the sole reliance of Tilesh's purported affidavit to support the plaintiff's application in encl. 3. The numerous impediments to the purported affidavit of Tilesh as alluded to earlier made the plaintiff's application in encl. 3 to stand on flimsy ground. In fact, encl. 3 collapsed like a deck of cards, so to speak, when Ahmad relied solely on the purported affidavit of Tilesh. That was a fatal manoeuvre on the part of the plaintiff.

Undaunted, Haji Suleiman Abdullah submitted that Ahmad was adopting the purported affidavit of Tilesh, which was an "English translation", that was

affirmed but not filed as part of Ahmad's evidence. At the bar, Haji Suleiman Abdullah volunteered the information that Tilesh is a Fijian and therefore he had to affirm his "affidavit" in the English language. Two things must be highlighted here. Firstly, the purported affidavit of Tilesh in the English language was not filed. Secondly, there was no national language version of Tilesh's purported affidavit. I must emphasise that these were the state of affairs when I heard encl. 3 on 28 June 2001 which ultimately gave rise to the *ex parte* injunctive order in encl. 5. Acting on hindsight, the plaintiff proceeded to refile Tilesh's affidavit in the national language on 13 July 2001, as seen in encl. 25, which was affirmed on the same date at 8.40am in an attempt to regularise the plaintiff's application in encl. 3. It was an exercise in futility. It was too late in the day to rectify the mistake. Incidentally, Tilesh's purported affidavit in the English language was affirmed on 28 June 2001. Haji Suleiman Abdullah conceded that when this court heard encl. 3 on 28 June 2001, encl. 25 was not in the court file since it was not filed as yet. Reliance was placed on the case of *In re Hinchliffe, A Person of Unsound Mind, Deceased (supra)* but, with respect, that case was concerned with certain exhibits to an affidavit which was properly filed and "stamped with the appropriate fee" which formed part and parcel of that affidavit and that case, consequently, was of no assistance to the plaintiff. Here by comparison, Tilesh's purported affidavit was not filed nor stamped with the appropriate fee and so Ahmad could not rely on it.

Mr M Pathmanathan vigorously argued that Tilesh's purported affidavit marked as "AZAM1" to the affidavit of Ahmad was entirely different in that it was riddled with impediments. Metaphorically speaking he submitted that:

> You can't exhibit a photograph of a tiger and call it a cat.

and he continued to submit:

> It must be a tiger before you can call it one. It must be an affidavit before you can admit it as an exhibit. Here, it is not an affidavit because it was not filed nor entitled (Order 41, rule 1(1) of the RHC).

and all these submissions were germane to the occasion. Haji Suleiman Abdullah submitted that the plaintiff was rushing through to prepare the purported affidavit of Tilesh but by comparison the plaintiff was able to file Ahmad's affidavit in accordance with the provisions of the RHC – affirmed, filed, entitled and in the national language. Surely the same could be done for Tilesh. As a Fijian, Tilesh was not excused from affirming and filing an affidavit in the national language: that would be the requirements of the RHC. It was rightly submitted by Mr M Pathmanathan that the plaintiff had a Bahasa version of Tilesh's purported affidavit otherwise an English translation would not have come about. He further submitted that if the Bahasa version was

available or even if it was not available, the matter should have been brought to the attention of the court on 28 June 2001 and the Bahasa version to be filed at the earliest possible time. Once again, it would be ideal to refer to *Daniell's Chancery Practice*, 8th edition by Steward Edward Williams and Frank Guthrie-Smith, vol. 1, at p. 534 and there the learned authors wrote:

> But unfiled affidavits may be used on an *ex parte* application where the matter is pressing, and when the offices are closed, and in such cases the Court may allow the affidavits to be used, and consider them as filed on their being handed to the Registrar, who will transmit them to the Filing Department, or it will make the order subject to the production to the Registrar of office copies thereof; and where this is not done it is the duty of the solicitor to file them *(Taylor v. Gates*, 72 L.T. 436).

and in the context of the present case, Haji Suleiman Abdullah did not draw my attention to the impediments inherent in Tilesh's purported affidavit nor did he give an undertaking to file the Bahasa Malaysia version of Tilesh's affidavit on 28 June 2001 when encl. 3 was heard. These failures must surely be construed adversely against the plaintiff in adjudicating encl. 9. Be that as it may, Tilesh's affidavit in the Bahasa Malaysia version in encl. 25 was filed at a leisurely pace and in the words of Gopal Sri Ram JCA "the law assists the vigilant and not the indolent" (*Gan Boon Kyee v. Yap Hong Sin & Anor* [1997] 3 CLJ 822 CA, at p. 826 of the report).

The sum total of all these submissions were that the defendant must succeed in their application in encl. 9. I accordingly granted the prayers sought for in paras. (a), (b) and (c) of encl. 9. Haji Suleiman Abdullah quickly applied for an oral stay. I advised him to file a formal application for a stay (*Chase Perdana Berhad v. Pekeliling Triangle Sdn Bhd & 2 Ors* [2001] 4 AMR 3825).